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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act— Competitive Bid	)	PP Docket No. 93-253

To: The Commission

PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Jackson and Dickens ("Petitioners") hereby requests clarification and, to the extent necessary, reconsideration of the Commission's Memorandum Opinion and Order on Reconsideration and Third Report and Order in WT Docket No. 96-18, FCC 99-98, 64 Fed. Reg. 33762 (June 24, 1999) ("Reconsideration Order"). As discussed below, the Reconsideration Order modifies the interference protection to be afforded to incumbent 929 MHz paging licensees in a way that is significantly at odds with the protection originally announced by the Commission. This modification will unfairly prejudice licensees who have acted in reliance on the original standard, during the two and one-half years which have elapsed since the adoption of the paging auction rules. Petitioners request the Commission to clarify that the modified protection standard will not apply to licensees who achieved exclusivity prior to the adoption of the paging auction rules, but who have subsequently dropped below the old exclusivity benchmarks, in reliance on the Commission's ruling that all incumbent stations will be protected.

I. Background

Petitioners represent several 900 MHz paging licensees, and have actively participated in each stage of the rulemaking[1]. Petitioners have filed on behalf of their clients several comments seeking to ensure that existing paging operations will be protected from interference due to geographic area paging licensees, so that the millions of dollars invested by incumbent licensees in their paging systems will not be stranded by the Commission's transition to spectrum auctions for an established service like paging.

II. The Commission Should Afford Full Interference Protection to Incumbents.

Paragraph 48 of the Reconsideration Order amends Rule Section 22.503(l), to clarify that incumbent 929 MHz licensees who did not achieve exclusivity under the prior Part 90 private carrier paging rules will continue to operate under the same sharing arrangements established with other licensees prior to the adoption of the final geographic area licensing rules in WT Docket No. 96-18. Petitioners do not dispute this ruling, which in essence preserves the status quo among incumbent licensees, so as not to impair some of the intricate sharing arrangements which have arisen on the thirty five potentially exclusive 929 MHz channels. However, the Commission proceeded to significantly modify the interference protection to be afforded to existing licensees, with the following statement: "We further clarify that MEA, EA, and

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[1] See, e.g., January 13, 1999, Petition for Reconsideration of Blooston, Mordkofsky, Jackson & Dickens; May 1, 1997 Reply Comments of Blooston, Mordkofsky, Jackson & Dickens; April 17, 1997 Comments of Blooston, Mordkofsky, Jackson & Dickens.

nationwide geographic area licensees will be able to share with non-exclusive incumbent licensees on a non-interfering basis." Id., at para. 48. This "clarification" directly contradicts the explicit ruling of the Commission in 1997 that all incumbent stations on the thirty-five potentially exclusive 929 MHz channels would be fully protected from the operations of the eventual geographic area licensees.

In particular, the Commission throughout this proceeding has responded to the paging industry's opposition to auctions with promises of interference protection for existing stations. In paragraph 148 of the Commission's February 9, 1996 Notice of Proposed Rulemaking, it stated that "in the event that we adopt our proposals for geographical area licensing, all existing PCP [private carrier paging] facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot." (Emphasis added) This language did not qualify the protection to be afforded to "all existing PCP facilities" by requiring exclusivity. Indeed, how could the Commission indicate that pending requests for exclusivity were now "moot", unless exclusivity no longer mattered because all incumbent stations were to be classified as primary *vis a vis* the eventual auction winner?

The Commission's final paging auction rules carried through on this promise of protection for all incumbents, by adopting interference protection rules that focused solely on the spectrum licensed to the incumbent, rather than its status as an exclusive licensee. Thus, Rule Section 90.493 was amended to define as "exclusive channels" the thirty-five 929 MHz channels which were not set aside for shared-use only in PR Docket No. 93-144. Section 90.493(b) was amended to afford all PCP operations on

the "exclusive channels" the same interference protection given to all Part 22 900 MHz paging licensees:

> "Licensing, construction and operation of paging stations on the exclusive channels in the 929-930 MHz band are subject to the application filing, licensing procedure, construction, operation and notification rules and requirements that are set forth in Part 22 of this chapter for paging operations in the 931-932 MHz band, instead of procedures elsewhere in this part. (Emphasis added)."

The Part 22 rules that now apply to the 929 MHz band do not differentiate by whether a licensee has achieved exclusivity. Indeed, the above language indicates that the exclusivity rules no longer apply. Thus, the 900 MHz paging world has been divided into two regimes: The "shared" channels (defined in Rule Section 90.494 as the five 929 MHz frequencies set aside for non-exclusive operation) and the "exclusive channels" (which now include the remaining thirty five 929 MHz frequencies). If the licensee operates on one of the exclusive channels, it is entitled to full protection under Part 22 of the Rules, and therefore cannot be forced to share its channel with the auction winner within the incumbent's protected service area.

This interpretation is bolstered by paragraph 69 of the Commission's February 24, 1997 Second Report and Order and Further Notice of Proposed Rulemaking in this proceeding (12 FCC Rcd 2732), in which it adopted final auction rules. In its discussion about co-channel interference protection, the Commission stated that "we are adopting the fixed distances in Tables E-1 and E-2 in Section 22.537 for the exclusive 929 MHz and 931 MHz channels. Geographic area licensees must provide co-channel protection to all incumbent licensees, including incumbents on the nationwide channels and incumbents in other geographic areas." (Emphasis added)

Again, the Commission focused solely on whether the "channels" have been designated as exclusive, and not whether the incumbent licensee has achieved exclusivity under the old rules. Indeed, the Commission unequivocally promises to protect "all incumbent licensees". It is Petitioners' experience that the Commission's Wireless Telecommunications Bureau staff has interpreted this language in precisely the same fashion, since the adoption of the auction rules.

It has been two and one-half years since the Commission issued its paging auction rules, with its promise of protection for all incumbent licensees. During that time, 929 MHz non-nationwide licensees have been unable to expand or substantially modify their paging systems, due to an application filing freeze that has choked off the ability of these carriers to respond to the demands of their customers, and has driven many to the point of economic ruin. The freeze has been particularly damaging to small and medium sized businesses in the paging industry, which generally have not been able to invest the capital necessary to obtain a nationwide paging license. Nationwide licensees have been free to expand and modify their coverage over the past three years, thereby exacerbating the plight of the other 929 MHz licensees. As a result of this situation, many licensees have had to pair back on their operations while awaiting the chance to expand their coverage by bidding in the auction. This is especially true in areas where they have partially implemented coverage, but the freeze prevented them from licensing and constructing enough transmitters to offer a quality service to the public. In such cases, some carriers have removed transmitters where customer demand was low, or where coverage was not adequate to attract customers, as a way to cut costs while awaiting the auction. Some carriers have removed one of

the six transmitters required for local exclusivity, finding that five provided adequate coverage for now.

The Commission should clarify that carriers which had achieved exclusivity as the adoption of the paging auction rules do not lose full co-primary interference protection from the auction winner, where they dropped below the number of transmitters required for exclusivity under the old rules, by removing transmitters in reliance on the Commission's revised rules and the above language in the Second Report and Order and Further Notice of Proposed Rulemaking, supra. Otherwise, the Commission's last minute change of course on this issue will work a severe prejudice on carriers already damaged by a three and one-half year old freeze, and an auction which has been delayed by more than one year. The Courts have routinely frowned upon retroactive interpretations or revisions of agency rules and decisions, when to do so effectively cuts-off a licensee's rights. See, e.g., Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 (D.C. Cir. 1986) (before retroactively applying its new processing rules to divest previously cut-off applicants of that protected status, the FCC *must* balance the "mischief" of retroactive application with the harm of undermining the new rules that would otherwise occur); McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

III. Conclusion

In light of the foregoing, Petitioners respectfully request that the Commission clarify or, to the extent necessary, reconsider its amendment of Rule Section 22.503(l), to prevent prejudice to existing paging carriers that have modified their systems in reliance on the Commission's earlier rulings.

Respectfully submitted,

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